91-1976

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

McDERMOTT INCORPORATED and
THE BABCOCK & WILCOX COMPANY,

Petitioners,

vs.

INTERNATIONAL INSURANCE COMPANY and
UNITED STATES FIRE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the "service of suit" clause a valid and enforceable forum selection clause which allows an insured the right to select the forum to litigate all issues related to the failure of an insurance company to pay claims? If so, does the "service of suit" clause permit a district court to dismiss another suit related to failure to pay the same claims filed by the insurance companies in, or removed to, a forum not selected by the insured?

LIST OF PARTIES

The parties to the proceedings below were the petitioners McDermott Incorporated and The Babcock & Wilcox Company and the respondents International Insurance Company and United States Fire Insurance Company.

RULE 28.1 LIST

The parent corporation of McDermott Incorporated and The Babcock & Wilcox Company is McDermott International, Inc.

Subsidiaries, Affiliates and Partnerships of McDermott International, Inc. (Excluding Wholly-Owned Subsidiaries)

Davy McDermott Ltd.
Initec, Astano Y McDermott International Inc., S.A.
Malmac Sdn. Bhd.
McDermott Arabia Company Limited
McDermott-ETPM, Inc.
P.T. McDermott Indonesia
McDermott Incorporated
B&W Mexicana, S.A. de C.V.
Babcock & Wilcox Beijing Company, Ltd.
Diamond Power Hubei Company Ltd.
Babcock & Wilcox Gama Kazan Teknolojisi Anonim Sirketi
Thermax Babcock & Wilcox Private Ltd.
Hudson Northern Industries, Inc.
Rotovent S.A. de C.V.
Diamond Power (Autralia) Pty. Limited
Halley & Mellowes Pty. Ltd.
Heerema-McDermott (Aust.) Pty. Ltd.
HeereMac
Panama Offshore Chartering Company, Inc.
McDermott (Nigeria) Limited
McDermott Scotland Limited
MMC - McDermott Engineering Sdn. Berhad
P.T. Babcock & Wilcox Indonesia
P.T. Bataves Fabrications

Topside Contractors of Newfoundland, Ltd.
Arabian Petroleum Marine Construction Company
DB/McDermott Company
Abahsain Hudson Heat Transfer Co. Ltd.
Construcciones Maritimas Mexicanas, S.A. de C.V.
ASEA Babcock PFBC
B&W Fuel Company
B&W Nuclear Service Company
Babcock-Ultrapower Jonesboro
Babcock-Ultrapower West Enfield
Diamond Power Specialty Limited
Espacialidades Termomecanicas S.A. de C.V.
Babcock & Wilcox Services, Inc.
KBW Gasification Systems, Inc.
North American CWF Partnership
Palm Beach Energy Associates
Maine Power Services
PowerSafety International, Inc.
South Point CWF

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VS.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioners McDermott Incorporated and The Babcock & Wilcox Company respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 9, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 956 F.2d 93, and is reprinted in the appendix hereto, p. A-3, *infra*. The petitioners suggestion for rehearing was denied. It is reprinted in appendix hereto p. A-1, *infra*.

The memorandum decision of the United States District Court for the Eastern District of Louisiana (McNamara, D.J.) has not been reported. It is reprinted in the appendix hereto, p. A-9, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1332(a)(1), the respondents brought this suit in the Eastern District of Louisiana. On April 24, 1991 the Eastern District of Louisiana granted petitioners' Motion to Dismiss. See p. A-9, infra.

On respondent's appeal, the Fifth Circuit on March 9, 1992, entered a judgment and opinion reversing the Eastern District of Louisiana. A petition for rehearing en banc was denied.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

All statutes are referenced in the Jurisdiction section.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE.

On February 28, 1991, International Insurance Company (hereinafter "International") and United States Fire Insurance Company (hereinafter "U.S. Fire"), filed a Complaint for Declaratory Judgment in the United States District Court for the Eastern District of Louisiana against McDermott Incorporated (hereinafter "McDermott") and The Babcock & Wilcox Company (hereinafter "Babcock & Wilcox".) seeking a declaration of their rights and obligations under several insurance policies issued to McDermott and Babcock & Wilcox by International and U.S. Fire. The Declaratory Judgment seeks solely to avoid payment of asbestos related claims.[1]

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[1] The federal district court had jurisdiction of this action pursuant to 28 U.S.C. § 1332(a)(1), in that there is diversity of citizenship between the plaintiffs and defendants, and the matter in controversy exceeds the sum of $50,000.

On March 15, 1991 McDermott and Babcock & Wilcox filed suit against International and U.S. Fire in State District Court in Jefferson County, Texas, Civil Action No. A-138-844, seeking collection of amounts due under the aforementioned policies. On April 9, 1991, International and U.S. Fire removed the Texas State Court action to the United States District Court for the Eastern District of Texas, Beaumont Division.

McDermott and Babcock & Wilcox, in response to the Petition for Declaratory Judgment filed by International and U.S. Fire, filed a Motion to Dismiss the Petition in the Eastern District of Louisiana under Rule 12 of the Federal Rule of Civil Procedure. The United States District Court for the Eastern District of Louisiana, the Honorable Judge A.J. McNamara, granted McDermott's and Babcock & Wilcox's Motion to Dismiss based on the forum selection clause contained in the policies pursuant to *Seattle-First National Bank v. Manges*, 900 F.2d 795 (5th Cir. 1990), citing *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1; 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Judge McNamara found the forum selection clause to be valid and enforceable.

International and U.S. Fire filed an appeal of that decision to the Court of Appeals for the Fifth Circuit. On February 19, 1992, the Fifth Circuit Court of Appeals vacated Judge McNamara's dismissal and remanded the proceedings to District Court. On March 9, 1992 the Fifth Circuit Court of Appeals withdrew the February 19, 1992 opinion and substituted another in its place. A Suggestion for Rehearing En Banc was filed by McDermott and Babcock & Wilcox but was subsequently denied.

B. STATEMENT OF FACTS.

International, U.S. Fire, and other insurers, not part of this suit, issued to McDermott and Babcock & Wilcox umbrella liability insurance policies having effective dates from April 1, 1981 to April 1, 1982, and April 1, 1982 to April 1, 1985.[2] The

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[2] Although there are other upper layer excess insurance policies issued to McDermott and Babcock & Wilcox by International and U.S. Fire, those policies are not in controversy.

policies provide indemnification of the insureds for all sums which the insureds are obliged to pay by reason of liability, imposed by law or assumed under any contract or agreement, for damages on account of personal injury or property damage. The policies all include a forum selection clause.

Numerous claims for personal injury arising from exposure to asbestos have been asserted against Babcock & Wilcox. All insurers subscribing to these policies of insurance except International and U.S. Fire have paid claims. McDermott and Babcock & Wilcox made demand for payment to International and U.S. Fire, through their counsel, for asbestos related claims. International and U.S. Fire did not make payment nor respond to the final demand but rather they filed a suit for Declaratory Judgment in the United States District Court for the Eastern District of Louisiana. McDermott and Babcock & Wilcox seek enforcement of a contractual obligation, i.e. the "forum selection clause", included in the insurance policies. Enforcement of the forum selection clause would allow McDermott and Babcock & Wilcox to litigate all issues raised in the forum which they, by contract, have the right to select.

REASONS FOR GRANTING THE WRIT

I.

THE "SERVICE OF SUIT" CLAUSE IS A VALID AND ENFORCEABLE FORUM SELECTION CLAUSE

In *International Insurance Company v. McDermott, Inc.*, 956 F.2d 93, (5th Cir. 1992), the Fifth Circuit Court of Appeals refused to enforce the forum selection clause included in all the insurance policies at issue. The clause included in the policies, referred to as a "service of suit" clause, states in pertinent part:

> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the assured, will submit to the jurisdiction of any court of

> competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction **and all matters arising hereunder shall be determined in accordance with the law and practice of such court.**[3] (Emphasis added.)

This identical clause has been held to be a forum selection clause by several federal courts. See, *Constance B. Foster v. Chesapeake Insurance Company, Ltd.*, 933 F.2d 1207 (3rd Cir. 1991) (forum selection clause enforced; removal denied); *In Re Delta America Re Insurance Co.*, 900 F.2d 890 (6th Cir. 1990) (forum selection clause not enforced; removal allowed); *McDermott International, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991) (forum selection clause exists co-equal with arbitration clause); and *City of Rose City v. Nutmeg Insurance Company*, 931 F.2d 13 (5th. Cir. 1991), *cert. denied* ____U.S.____, 112 S.Ct. 301, 116 L.Ed.2d 244 (forum selection clause enforced; insured to determine forum of dispute).

However, the Fifth Circuit Court of Appeals held in the instant case that the forum selection/service of suit clause speaks *only* to actions brought by the insured and that if the insurer files suit first then the forum selection clause has no application. *International*, *Id.*, at 95-96. The Appellate Court, cited no authority for this distinction and had no factual record to support its conclusion that a forum selection clause is *only* "intended" to be enforceable in the instance where the insured files first. Apparently, in the instant case, the Fifth Circuit rethought its earlier holding in *Nutmeg* and determined that the service of suit clause at issue allows the insured the right to choose the forum only if the insured files first. *International*, 956 F.2d at 95. Specifically, the Court stated:

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[3] Forum selection clauses are in rather wide spread use throughout the insurance industry. The clause in question is standard form and written by the insurers. *Reference Book of Marine Insurance Clauses*, Witherby Publishing (London 1979).

> "Indeed, the Service of Suit clause itself speaks only to actions brought by the insured. Thus, when the action is first instituted by the insurer, the Service of Suit clause simply has no application." *Id.*, at 95-96.

This distinction seems extraordinarily shallow in light of the fact that a plaintiff always picks the forum where a suit is filed.

This conclusion by the Fifth Circuit is in conflict with this Court's ruling in *Carnival Cruise Lines, Inc. v. Shute*, ____U.S.____, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). In *Carnival*, the plaintiffs filed suit in a Washington Federal District Court even though the contract included a forum selection clause specifying courts in Florida as the location for any litigation. This Court upheld the forum selection clause included in the contract and reinstated the District Court's dismissal. This Court in *Carnival* did not consider "who filed first" but rather considered the appropriate interpretation of the contract.

The Fifth Circuit Court of Appeals, when previously considering the service of suit clause, did not look to determine who filed first as the fundamental issue, but instead looked to see if the insurer had failed to pay as the primary issue. *McDermott International, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991). The Fifth Circuit in *Lloyds Underwriters of London*, interpreting the decision in *Nutmeg*, determined that the insurers' action unmistakably invoked the service of suit clause's " 'failure. . . to pay' application language." *Lloyds Underwriters of London*, 944 F.2d at 1207. Therefore, the Fifth Circuit determined that if the suit arose as the result of the insurer's "failure . . . to pay", then the service of suit clause was invoked. It did not qualify who filed first.

The claims in the instant case arise from the insurers "*failure to pay*" Babcock & Wilcox, petitioners herein, for asbestos related claims due under their policies. Therefore, according to the terms of the forum selection clause, Babcock & Wilcox is entitled to choose the forum where to litigate its rights under the policy to the exclusion of other courts where the insurance

company may wish to bring/remove suit. The Fifth Circuit erroneously and improperly has denied the petitioners that right to choose the forum and dismiss the identical suit brought by the insurance companies.

II.

THE COURTS OF APPEALS HAVE ISSUED CONFLICTING DECISIONS AND INTERPRETATIONS ON THE SERVICE OF SUIT CLAUSE AND THE GRANT OF A WRIT OF CERTIORARI IS NECESSARY TO BRING ABOUT UNIFORMITY OF DECISIONS ON THIS MATTER.

The Fifth Circuit, as noted *supra*, has decided that the "service of suit"/forum selection clause, may be used to prevent removal if the insured files first, but has no application if an insurance company files its suit first. In essence, the Fifth Circuit held that the insured does not have the exclusive right to select a forum because the forum selection clause is not enforceable to dismiss an identical suit.

The Third Circuit Court of Appeals held in *Constance B. Foster v. Chesapeake Insurance Company, Ltd.* 933 F.2d 1207 (3rd Cir. 1991), that a clause essentially identical to the forum selection clause in the McDermott policy gave the insured the enforceable right to select the forum for litigation on its policy rights and, thus prevented removal, *Id.*, at 1219.

The Sixth Circuit for the United States Court of Appeals in *In Re Delta America Re Insurance Co.*, 900 F.2d 890 (6th Cir. 1990) determined that the service of suit clause was a forum selection clause but not enforceable because it was merely jurisdiction language written into the policy by Underwriters. *Id.*, at 893. The Sixth Circuit stated that a primary function of the clause was to ensure that the insurer would submit the jurisdiction of the United States and that the insurer did not intend there to be a waiver of its right to remove the suit. As a result, the Sixth Circuit allowed the reinsurer to remove the suit and did not enforce the forum selection clause.

The Sixth and Third Circuits interpreted essentially the same forum selection clauses and came to entirely different conclusions. Now the Fifth Circuit has again taken the essentially same forum selection clause and has created more conflict. In *Nutmeg*, 931 F.2d at 15 the Fifth Circuit held:

> On its face the endorsement is unambiguous. It plainly requires that the insurer submit to the jurisdiction of any court of the policyholder's choosing. Nutmeg agreed to "submit to the jurisdiction of any court," to "comply with all requirements necessary to give such court jurisdiction," and to "abide by the final decision of such court." Thus, while the provision does not specifically mention the right of a defendant to remove an action from state to federal court, the language of the clause makes clear that the policyholder *shall enjoy the right to choose the forum in which any dispute will be heard. Nutmeg*, 931 F.2d at 15. (Emphasis added.)

However, the Fifth Circuit in the instant case has held that the insured cannot exercise the contractual right provided to it by the insurer in a policy of insurance if the insured does not "win the race to the courthouse." The service of suit clause has been subject to numerous and conflicting decisions by the circuits, and there is a need for uniformity. This Court should use the grant of a writ of certiorari to determine that the "service of suit" clause is a valid and enforceable forum selection clause that gives the insured the right to select a forum and prevent insurance companies from trying to circumvent contractual obligations.

III.

THE DECISION BY THE FIFTH CIRCUIT COURT OF APPEALS IN *INTERNATIONAL* IS IN DIRECT CONFLICT WITH THE SUPREME COURT HOLDINGS IN *THE BREMEN* AND *CARNIVAL CRUISE LINES*

This Court has held that a forum selection clause is "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *The Bremen*, 407 U.S. at 10, 92 S.Ct. at 1913. In the instant case the insurance companies do not make any allegation that the forum selection clause is unreasonable. Rather, the insurance companies claimed that even though their failure to pay the claims caused this suit to be filed, the insurers won the "race to the courthouse" and the insured lost its right to choose the forum where its claim was to be litigated. The Fifth Circuit accepted the insurance companies' argument, though acknowledging that the decision "may in some cases lead to an unfortunate race to the courthouse" and reversed the district court's dismissal of the case.

The Fifth Circuit's decision in this case is directly in conflict with this Court's holding in *The Bremen* and *Carnival*. This insurance contract is between experienced and sophisticated parties. It should be honored by the parties to the contract and enforced by the courts. *The Bremen*, 407 U.S. at 12, 92 S.Ct. 1914.

The companies who underwrote the insurance covering Babcock & Wilcox subject to the terms of these policies were aware that the forum selection clause was included in the insurance contracts and, had they desired or intended to, limit the clause to affect only foreign insurers or to authorize a race to the courthouse, they could have.[4] The clause was not so written.

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[4] The clause was limited in *Constance B. Foster v. Chesapeake Insurance Company, Ltd.*, 933 F.2d 1207 (3rd Cir. 1991), by only applying to insurers not domiciled in the United States.

This Court has stated that, in general, "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as involved here, should be given full effect." *Carnival*, at 1526, citing *The Bremen*, 407 U.S. at 12-13, 92 S.Ct. at 1914-15 (footnote omitted). The insurance companies have not alleged, nor was any evidence presented to the district court, that this insurance policy was obtained with any undue influence, overweening bargaining power or fraud. Therefore the forum selection clause should be enforced allowing the insured to choose the forum.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted. The Fifth Circuit Court of Appeals has denied the insured the opportunity to exercise its contractual right to choose the forum for litigation upon the failure of the insurance companies to pay claims. The Third, Fifth and Sixth Circuits are in conflict and the grant of writ of certiorari is the appropriate method to bring uniformity to the federal courts. If the petitioner is correct in urging that the forum selection clause is valid and enforceable, the ruling of the district court should be reinstated.

Respectfully submitted:

/s/ Rockne L. Moseley

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3398

INTERNATIONAL INSURANCE COMPANY,
an Illinois Corporation, ET AL.,

Plaintiffs-Appellants,

versus

MCDERMOTT INCORPORATED, a
Delaware Corporation, ET AL.,

Defendants-Appellees.

U.S. COURT OF APPEALS
FILED APR 13 1992
GILBERT F. GANUCHEAU CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SUGGESTION FOR REHEARING EN BANC

(Opinion March 9, 5 Cir., 1992,_____F.2d_____)

( )

Before POLITZ, Chief Judge, KING and JOHNSON, Circuit Judges.

PER CURIAM:

(×) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestions for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam D. Johnson
United States Circuit Judge
4-9-92

REHG-8

INTERNATIONAL INSURANCE COMPANY,
an Illinois Corporation, et al., Plaintiffs-Appellants,

v.

McDERMOTT INCORPORATED,
a Delaware Corporation, et al., Defendants-Appellees.

No. 91-3398.

United States Court of Appeals,
Fifth Circuit.

March 9, 1992.

Insurers brought declaratory judgment action against insured as to their rights and liabilities with respect to umbrella and excess liability policies. Insured, who subsequently filed action in state court to recover amounts allegedly due under two of those policies, moved to dismiss insurers' federal action, claiming that "Service of Suit" clause contained in each policy gave insured right to select forum. The United States District Court for the Eastern District of Louisiana, A.J. McNamara, J., granted insured's motion to dismiss. Insurers appealed. The Court of Appeals, Johnson, Circuit Judge, held that "Service of Suit" clause did not allow insured to block, by subsequent filing in state court, insurers' otherwise valid federal action for declaratory judgment.

Vacated and remanded.

Opinion, F.2d , withdrawn.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, Chief Judge, and KING and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

The Court's prior opinion in this case, of Feb. 19, 1992, is withdrawn in its entirety, and the following substituted in its place.

Today this Court once again turns its attention to issues of interpretation of contracts of insurance. In particular, we are asked to resolve, for the second time in the last several months, a question regarding a clause common in insurance policies, commonly known as a "Service of Suit" clause.

I. Facts and Procedural History

Between 1981 and 1986 the International Insurance Company and U.S. Fire Insurance Company issued ten policies of umbrella and excess liability insurance to McDermott, Inc. In 1989 and 1990, McDermott and International engaged in discussions regarding whether and to what extent these policies provide coverage for some 20,000 asbestosis actions pending against McDermott and its subsidiary, Babcock & Wilcox, Inc. The gravamen of the asbestosis actions is an allegation that certain boilers manufactured by Babcock & Wilcox contained or incorporated asbestos insulation materials which allegedly caused asbestosis.

On January 3, 1991, McDermott made a formal demand on International for payment of amounts McDermott contended were due under the ten policies. McDermott told International that if it did not pay within thirty days, McDermott would "institute proceedings." The thirty day deadline came and went. International did not pay. McDermott did not institute proceedings. On February 28, 1991, International and U.S. Fire filed their own complaint, seeking a declaratory judgment as to their rights and liabilities with respect to all ten policies of insurance. They filed their complaint in the United States District Court for the Eastern District of Louisiana, the district in which McDermott and Babcock & Wilcox maintain their corporate headquarters. McDermott concedes that if the action

may be maintained in the federal court, then jurisdiction and venue are proper in the Eastern District of Louisiana.

On March 15, 1991, about two weeks after International and U.S. Fire had filed their complaint in the federal district court, McDermott filed an action in state court in Jefferson County, Texas. In the state court action McDermott seeks to recover amounts McDermott claims under two of the ten policies, covering about 100 of the 20,000 outstanding asbestosis actions. Three days after it filed its action in Texas state court, McDermott moved to dismiss the federal action.

In its motion to dismiss the federal action, McDermott relies on a "Service of Suit" clause contained in each of the ten policies of insurance. That clause provides:

> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

The federal district court concluded that this clause was a "forum selection clause," and that because McDermott, the insured, had chosen the Texas state court as its forum, the federal action had to be dismissed. International and U.S. Fire appeal.

II. Discussion

Just last term, in *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13 (5th Cir. 1991), this Court held that a "Service of Suit" clause substantially identical to the one at issue in this case gave the insured the right to choose the forum in which to try its claims against the insurer, and prohibited the insurer from

removing an insured's state court action to federal court. 931 F.2d at 15. The question presented by the instant case is whether that same clause allows an insured to block, by a subsequent filing in state court, the insurer's otherwise valid federal action for declaratory judgment.

In *Nutmeg* an assignee of the insured filed an action against the insurer in Texas state court. The insurer removed the action to federal court. The assignee attempted to have the case remanded to the state court, but the federal court refused, and instead granted summary judgment to the insurer. The assignee appealed to this Court. We reversed the decision of the district court, holding that the case had to be remanded to the state court:

> by including the "Service of Suit" endorsement in the general liability policy it issued to [the insured], [the insurer] ceded to [the insured] . . . the right to choose the forum in which any dispute would be heard, and has foregone its right to remove the action.

Id. Relying on this language, McDermott contends that an identical Service of Suit clause in the policies of insurance at issue here entitles it "to choose the forum in which any dispute [will] be heard." In response, International and U.S. Fire argue that the Service of Suit clause does not mean—and should not be read to mean—that the insurer may not bring a declaratory judgment action of its own against the insured, or that the insurer may only bring a declaratory judgment action in a forum chosen by the insured.

International and U.S. Fire have the better of the argument. *Nutmeg* dealt with the situation in which an insured brings suit in a forum of its choosing, only to have its action removed to another forum of the insurer's choosing. In a strict sense, *Nutmeg* holds only that a Service of Suit clause like the one at issue there prevents an insurer from removing an action that the insured files in state court. *Nutmeg* certainly does not hold that a Service of Suit clause prevents the insurer from bringing an action of its own against the insured. Moreover, *Nutmeg* deals only

with disputes raised (and complaints filed) by the *insured*. *Nutmeg* has nothing to say about complaints filed by the *insurer*. Indeed, the Service of Suit clause itself speaks only to actions brought by the insured. Thus, when the action is first instituted by the insurer, the Service of Suit clause simply has no application.

Although it seems obvious that there is or will be some overlap between the federal and state actions between McDermott and the insurers, it is not clear from the record in this case that there is in fact any such overlap. If it develops that there is such an overlap – if the same issues are being litigated in two different courts – then that problem may be dealt with by reference to the usual panoply of rules governing judicial economy, the integrity of judgments, comity between federal and state courts, and the like.[1] This Court has no warrant, and no wish, to upset those rules on no greater basis than the construction of a single clause in a group of contracts of insurance.

The Court realizes that construing the Service of Suit clause to allow the insured to choose which forum will hear *its* action and to allow the insurer to choose which forum will hear *its* action may in some cases lead to an unfortunate race to the courthouse. On the other hand, the far-reaching construction of the Service of Suit clause advocated by McDermott leads to untenable results. If McDermott's position were to prevail, then the insured could effectively block an otherwise valid federal action simply by a later filing in state court. Indeed, under McDermott's absolute reading of the clause, McDermott might not even be required to respond to a declaratory judgment or other action filed against it by the insurer. McDermott could

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[1] Thus, as International and U.S. Fire concede, they must appear in the Texas court in which McDermott has filed its action, and must submit to the jurisdiction of that court. The Service of Suit clause requires as much. If the issues in that case prove to be duplicative of issues in the federal action, then it will be up to the state court to decide what action to take to avoid trying the same case in two courts.

simply choose another forum, file suit, and have the insurer's action stayed or dismissed. McDermott would thus make the Service of Suit clause a convenient mechanism by which the insured could deprive the insurer of its right to seek a declaratory judgment or other redress from the courts. The Service of Suit clause certainly was not so intended.

Accordingly, while this Court reaffirms its holding in *Nutmeg* that the Service of Suit clause gives the insured the right to choose which forum will hear *its* action, we hold today that the Service of Suit clause does not give the insured the right to prevent the insurer from bringing an action of its own, in a forum of the insurer's choosing, against the insured. Nothing in *Nutmeg* is to the contrarty.

III. Conclusion

For the reasons stated, the judgment of the district court is vacated and the case is remanded for further proceedings consistend with this opinion.

VACATED AND REMANDED.

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED APR 24 1991
LORETTA G. WHITE
CLERK OF COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL INSURANCE CO. ET AL	*	CIVIL ACTION
VERSUS	*	NO. 91-0848
McDERMOTT INCORPORATED, ET AL	*	SECTION "D" (6)

JUDGMENT

For the reasons set forth in the court's Minute Entry dated April 22, 1991;

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Defendants, McDermott Incorporated and the Babcock and Wilson Company, and against Plaintiffs, International Insurance Company and United States Fire Insurance Company, dismissing Plaintiffs' Complaint without prejudice, each party to bear his own costs.

New Orleans, Louisiana, this 24 day of April, 1991.

/s/ A.J. McNamara
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
McNAMARA, J.
APRIL 22, 1991

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT
APR 24 8 25 AM '91
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	*	NO. 91-0848
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	*	SECTION
McDERMOTT INCORPORATED, ET AL	*	"D" (6)

Before the court is the Motion of Defendants, McDermott Incorporated ("McDermott") and The Babcock & Wilson Company ("B&W") (collectively the "Defendants"), to Dismiss, Stay, Remove or Transfer. Plaintiffs, International Insurance Company ("International") and United States Fire Insurance Company ("U.S. Fire") (collectively the "Plaintiffs"), oppose the Motion. The Motion is before the court on briefs, without oral argument.

Defendants' Motion is based on a forum-selection clause contained in the insurance policies they purchased from Plaintiffs. The clause provides that if the Underwriters fail to pay any amount claimed to be due under the policy, the Underwriters, at the request of the insured, must "submit to the jurisdiction of any court of competent jurisdiction. . . ."

A dispute developed regarding Plaintiffs' obligation to indemnify Defendants on certain insurance policies. In a letter dated January 3, 1991, McDermott informed Plaintiffs that if Plaintiffs did not pay the amount due within 30 days of the letter's date, that B&W intended to "institute proceedings to collect. . . ." On February 28, 1991, Plaintiffs filed the instant suit for Declaratory Judgment concerning their obligations under the policies in this court almost one month after B&W's deadline of February 2, 1991. Defendants had not filed suit at that time.

Before answering the instant suit, Defendants filed suit against Plaintiffs in a Texas state court on March 15, 1991, seeking collection of the amount due under the policies for settlement of asbestos claims. Defendants now seek enforcement of the forum-selection clause and to have Plaintiffs' suit filed for declaratory judgment against Defendants in this court dismissed, stayed, removed or transferred.

A "forum-selection clause is prima facie valid and should be enforced unless the resisting party shows that enforcement would be unreasonable." *Seattle-First Nat'l. Bank v. Manges*, 900 F.2d 795, 799 (5th Cir. 1990). Enforcement would be unreasonable if the clause was obtained through fraud or overreaching or "if forcing the resisting party to proceed in the chosen forum would be so difficult for that party that it would effectively deprive it of its day in court." *Seattle-First Nat'l. Bank*, 900 F.2d at 799.

No evidence of fraud or overreaching has been presented by Plaintiffs nor have Plaintiffs shown that enforcement would "effectively deprive" them of their day in court.[1] Thus, the court finds that the forum-selection clause contained in the policies is valid and enforceable and that Plaintiffs' complaint should be dismissed without prejudice. Accordingly;

For the reasons stated herein, IT IS ORDERED that the Motion of Defendants to Dismiss Plaintiffs' complaint should be and is GRANTED. Further, IT IS ORDERED that Plaintiff's complaint is DISMISSED without prejudice.

* * * *

/s/ A.J. McNamara

[1] Additionally, Defendants allege that Plaintiffs wrote the policies which plainly state that "at the request of the Assured [the Underwriters] will submit to the jurisdiction of any court of competent jurisdiction. . . ." It is clear that the policies allow Defendants, the Assured, their choice of forum. Further, the inclusion of such a clause indicates to the court that the parties contemplated the possibility of an inconvenient forum. Thus, if the parties freely negotiated the agreement "[i]t is difficult to see why . . . a claim of inconvenience should be heard to render the forum clause unenforceable." *M/S Bremen v. Zapata Off-Shore Co.*, 92 S. Ct. 1907, 1916-17 (1972).

Supreme Court, U.S.
FILED
JUL 7 1992
OFFICE OF THE CLERK

No. 91-1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

McDERMOTT INCORPORATED and
THE BABCOCK & WILCOX COMPANY,

Petitioners,

v.

INTERNATIONAL INSURANCE COMPANY and
UNITED STATES FIRE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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July 7, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3286

QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err in holding that a standard "service of suit" clause does not require dismissal of insurers' declatory judgment action?

LIST OF PARTIES

Respondents, International Insurance Company and United States Fire Insurance Company, were plaintiffs below. Petitioners, McDermott Incorporated and The Babcock & Wilcox Company, were defendants below.

The parent corporation of International Insurance Company and United States Fire Insurance Company is Crum and Forster, Inc.

Crum and Forster, Inc., is a wholly-owned subsidiary of Xerox Financial Services, Inc., which in turn is a wholly-owned subsidiary of Xerox Corporation.

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STATEMENT OF THE CASE

The facts are correctly and succinctly set forth on pages 94 and 95 of the Fifth Circuit's decision in *International Ins. Co. v. McDermott, Inc.*, 956 F.2d 93 (5th Cir. 1992). This suit is a declatory judgment action filed by International Insurance Company and United States Fire Insurance Company against McDermott

Incorporated and The Babcock & Wilcox Company, to determine the scope of coverage, if any, under ten insurance policies. Defendants-insureds responded to the suit by filing their own, limited action in Texas, then moving for dismissal of this case on the grounds of the "service of suit" clause in the policies.

All ten policies of insurance subscribed to by International Insurance Company and United States Fire Insurance Company to The Babcock & Wilcox Company and McDermott Incorporated contained the following clause:

> "4. *SERVICE OF SUIT*
> It is agreed that in the event of the failure of underwriters hereon to pay any amount claimed to be due hereunder, underwriters hereon, at the request of the assured, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.
>
> It is further agreed that service of process in such suit may be made upon Faris, Ellis, Cutrone, Gilmore, Lautenschlaeger, Counsellors at Law, 1207 Whitney Building, New Orleans, Louisiana, 70130 and that in suit instituted against any one of them upon this policy, underwriters will abide by the final decision of such court or appellate court in the event of an appeal.
>
> The above-named is authorized and directed to accept service of process on behalf of the underwriters on any such suit and/or upon the assured's request to give a written undertaking to the assured that they will enter a general appearance upon the underwriters' behalf in the event such suit shall be instituted."

None of the policies issued by respondents contained a forum selection clause.

ARGUMENT

I.

THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT A SERVICE OF SUIT CLAUSE DOES NOT COMPEL DISMISSAL OF AN INSURER'S DECLATORY JUDGMENT ACTION.

As the Fifth Circuit correctly noted, "the service of suit clause itself speaks only to actions brought by the insured." *International Ins. Co. v. McDermott, Inc.*, 956 F.2d 93, 95 (5th Cir. 1992). A service of suit clause thus is not and cannot be a device for compelling dismissal of an insurer's suit. Petitioners would have this Court construe a simple service of suit clause as giving to an assured an unqualified right to deprive an insurer of its right to seek a declatory judgment or any other redress in court, by simply choosing another forum and having the insurer's suit dismissed. There is nothing in the service of suit clause which even suggests such an untenable result.

The Fifth Circuit correctly held that the service of suit clause does not give to the assured the right to prevent the insurer, respondents here, from bringing an action of their own in a forum of the insurer's choosing.

II.

THE FIFTH CIRCUIT'S DECISION IN *INTERNATIONAL* DOES NOT CONFLICT WITH ANY OTHER COURT DECISION.

The Fifth Circuit's decision below does not conflict with any other decision of any other circuit court or with any decision of this Court. There is nothing about this litigation or the Fifth Circuit's decision resolving this dispute that requires the intervention of the United States Supreme Court.

City of Rose City v. Nutmeg Insurance Company, 931 F.2d 13 (5th Cir. 1991), *cert. den'd*, ___ U.S. ___, 112 S.Ct. 301, 116 L.Ed.2d 244, and *Constance B. Foster v. Chesapeake Insurance Company, Ltd.*, 933 F.2d 1207 (3d Cir. 1991), both are limited to the issue of whether the service of suit clause prevents removal to federal court of state court actions filed by the assured; they do not address the issue of whether the service of suit clause has any bearing on suits brought by the insurer. The decision of the Sixth Circuit in *In Re Delta America Re-Insurance Co.*, 900 F.2d 890 (6th Cir. 1990), supports the decision of the Fifth Circuit in *International* below.

Both the *Bremen v. Zapata Offshore Company*, 407 U.S. 1; 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), and *Carnival Cruise Lines, Inc. v. Shute*, ___ U.S. ___, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) concern clear and unequivocal forum selection clauses, not the service of suit clause.

The decision of the Fifth Circuit below in *International* represents a clear, fair, and common-sense approach to construing the service of suit clause. It does not conflict with any other decision of any court, because there is no other reported case that involves parties, like petitioners here, who have sought to use the service of suit clause to defeat an insurer's right to file suit. The Fifth

Circuit correctly held that there was nothing in the insurance policy to suggest that the service of suit clause could be used to defeat an insurer's right to file suit.

CONCLUSION

The service of suit clause means what it says: The insurer must submit to the choice of forum in an action brought by the insured. The service of suit clause does not prohibit an insurer from filing suit. If such was the intent of the parties, the policies would have so stated. The policies do not, and the Fifth Circuit refused to permit petitioners to use the service of suit clause to prevent International Insurance Company and United States Fire Insurance Company from pursuing their declatory judgment action.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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July 7, 1992